Supreme Court, U.S
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

W.B. YORK, PETITIONER,

v.

DERONN WRATHER, STEPHEN WILLIAMS AND VINCENT TURNER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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13pp

QUESTIONS PRESENTED

1. Whether, a public official asserting the defense of qualified immunity in a 42 U.S.C. § 1983 case is entitled to summary judgment when the record shows the official was exercising the discretionary duties of his office but the record remains unclear as to whether the official acted reasonably or not and this question arises from a lack of evidence rather than conflicting evidence presented by the plaintiff.

2. Whether a court improperly applies the doctrine of *respondeat superior* in a 42 U.S.C. § 1983 case when it denies qualified immunity to a public official and places the burden upon the official to come forward with evidence demonstrating that he should not be held liable for the actions of his subordinates.

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(5th ed. 1984) 9

IN THE SUPREME COURT OF THE UNITED STATES

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	)	
RESPONDENTS.	)	

PETITION FOR A WRIT OF CERTIORARI

W. B. York petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinions of the court of appeals (App. A, *infra*, 1a-6a) and the district court (App. B, *infra*, 7a-36a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. I.

STATEMENT

1. Respondents Deronn Wrather, Stephen Williams, and Vincent Turner brought the present action for violation of constitutional rights against Petitioner Major W.B. York, Tulsa Police Department, and numerous other defendants, including the City of Tulsa, following their arrest after a Ku Klux Klan (KKK) rally held in Tulsa, Oklahoma. The material facts pertaining to Petitioner are not disputed.

On May 4, 1996, members of the Ku Klux Klan (KKK) held a rally on the public square located at the north side of the Tulsa County Courthouse. After the rally ended, approximately sixty (60) anti-KKK protestors gathered on the street near the south side of the courthouse building. The group appeared to be waiting for the KKK to leave the courthouse area. (App. A., *infra*, 2a; ER[1] at 00001-00003).

A short time later, Tulsa Police Department office observed KKK sympathizers nearby. Lt. Karen Rovan

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[1] "ER" refers to excerpts of the district court record that were filed with the Tenth Circuit. This was referred to as the Appellant's Appendix Volume 1 in the Tenth Circuit.

assigned officers to escort these people from the area. (App.B, *infra*, 12a-13a).

At about this same time, Sgt. Jim Clark, observed several people in the street striking and kicking passing cars. Sgt. Clark and Sgt. Charles Jordan advised Lt. Rovan and Petitioner of the situation. Petitioner was not present at the scene; he was stationed at a temporary command post located at least a block away from where the protesters and crowd had gathered. Based upon information provided by Sgt. Clark and Sgt. Jordan, Petitioner agreed with the decision to clear the street and move the crowd onto the adjoining sidewalk, so that any remaining KKK sympathizers could leave the area. (App.B, *infra*, 11a-13a; ER at 00031, 00052-00053, Plaintiff' s Response, p. 10).

According to accounts provided by officers at the scene, when the crowd was instructed to move out of the street, many persons become agitated. Several individuals refused to move. Some threatened the officers with violence. In response, a group of officers formed a skirmish line and began moving the crowd out of the street and onto the sidewalk. The situation deteriorated to the point that it became necessary to bring in mounted officers. (App.B, *infra*, 12a-13a). Several arrests were made. Respondent Vincent Turner was arrested for disorderly conduct after he challenged officers to remove him. Respondent Deronn Wrather was arrested for physically interfering with the arrest of Vincent Turner and assaulting a police officer. Respondent Steven Williams was arrested after he attacked officers while they were trying to handcuff Deronn Wrather. (App.A, *infra*, 2a).

2. Respondents commenced this action on March 7, 1997, in the United States District Court for the Northern District of Oklahoma. They alleged violation of First, Fourth, Fifth, Thirteenth and Fourteenth Amendment rights. The Fifth and Thirteenth Amendment claims were dismissed on defense motions during the pleading stage of this litigation. At the close of discovery, Petitioner and the other individually named defendants, simultaneously moved for dismissal of the remaining claims on grounds of qualified immunity and summary judgment. (App. A. *infra* 2a-3a).

On October 28, 1999, the district court entered an order granting in part and denying in part these motions. The district court granted Petitioner summary judgment on Respondents' Fourth and Fourteenth Amendment claims, finding no evidence of any constitutional violation. (App.B., *infra*, 13b-20b).

The district court denied Petitioner's request for qualified immunity on Respondents' First Amendment claims. (App.B., *infra*, 5b-7b). The only reason given by the district court for denying qualified immunity to Petitioner was a finding that "[i]t also appears that Sgt. Jim Clark and Sgt. Charles Jordan conferred about the situation with Major W.B. York and they decided to disperse the crowd." (App.B., *infra*, 11b).

3. Petitioner took an interlocutory appeal to the United States Court of Appeals, Tenth Circuit. The Tenth Circuit dismissed this appeal on jurisdictional grounds. (App.A., *infra*, 1a-2a, 6a). Purporting to follow a *Johnson v. Jones*, 515 U.S. 304 (1995) analysis, the appeals court stated:

> Defendants-appellants York and Bonham attempt to cast their arguments as questions of

> law, however, arguing they cannot be held liable because they relied on information provided by other officers in making their decisions. An officer" 'may rely on information furnished by other law enforcement officials to. . .develop probable cause.' " Baptiste v. J.C. Penney Co., 147 F. 3d 1252, 1260 (10th Cir. 1998)(quoting Albright v. Rodriguez, 51 F. 3d 1531, 1536 (10th Cir. 1995)). Qualified Immunity is available, however, only if such reliance was "objectively reasonable." Baptiste, 147 F.3d at 1260. This is a question of fact. (App., *infra*, 5a).
>
> Here, *the record does not show what information was communicated to defendant-appellant York* or to defendant-appellant Bonham. *Without such information, the court cannot presume that the officers acted reasonably* simply because they relied on the observations of other officers. (App., *infra*, 5a-6a). (emphasis added).

REASONS FOR GRANTING THE PETITION

Petitioner recognizes that, in certain circumstances, certiorari may be denied when the facts of the controversy are not sufficiently developed. However, this petition asks the Court to grant certiorari to correct an erroneous decision regarding which party has the burden to develop the facts when the defense of qualified immunity is raised. Specifically, petitioner asks this Court to review a decision of the United States Court of Appeals for the Tenth Circuit which places the

burden upon the defendant in a 42 U.S.C. §1983 case to prove that he or she is entitled to qualified immunity. Petitioner asks this Court to grant the petition to clarify the proper allocation of the burden of proof when a public official raises the defense of qualified immunity and to preserve uniformity of decision among the circuit courts.

I. THE TENTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT AND OTHER CIRCUIT COURTS IN THAT IT PLACES THE BURDEN UPON A DEFENDANT IN A 42 U.S.C. § 1983 CASE TO PROVE THAT HE IS ENTITLED TO QUALIFIED IMMUNITY.

Petitioner is a supervisor with the Tulsa Police Department. His only connection to the KKK demonstration was that he was the Major in overall charge of crowd control. Petitioner was not present at the scene. The only information he had regarding the situation at the scene was provided to him by Sgt. Jordan and Sgt. Clark, who were at the scene.

The record does not disclose how Sgt. Jordan and Sgt. Clark described the scene to Petitioner. The record merely reflects that Sgt. Jordan and Sgt. Clark conferred with the Petitioner and the decision was made to, in Jordan's words, "attempt to move these people out of the street and allow a clear path for the people to leave and go to their cars on the south side of the street." (ER at 0031).

This was hardly a directive to the officers to engage in unconstitutional conduct. However, the Tenth Circuit effectively held that a defendant in a §1983 case must overcome a presumption that he or she acted unconstitutionally when, after noting the record did not show what information was communicated to Petitioner, it stated "the court cannot presume that the officers acted reasonably" and thereby placed the burden of proving entitlement to qualified immunity upon Petitioner. (App. A, *infra* at 6a).

Following this Court's direction, the general rule of courts of appeal in this country is that the plaintiff has the burden of negating the defendant's qualified immunity defense. *Salas v. Carpenter*, 980 F.2d 299, 304 (5th Cir. 1992). In order to carry his or her burden, a plaintiff must do more than identify in the abstract a clearly established right and allege that the defendant has violated it. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). It is the plaintiff's burden to demonstrate how, under the circumstances presented, a reasonable official would understand that his personal conduct violates that right. *Id.*

Once a defendant asserts qualified immunity, the plaintiff bears the burden of proving that the defendant violated a law that was clearly established. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1157 (9th Cir. 2000). See also, *Jackson v. Sauls*, 206 F.3d 1156, 1165 (11th Cir. 2000) (holding that the burden of showing that the officers violated clearly established law falls on the plaintiff). The ultimate burden of proof is on the plaintiff to show that the defendant is not entitled to qualified immunity. *Scott v. Clay County*, 205 F.3d 867, 873 n.9 (6th Cir. 2000). See also, *Lowe v. Aldridge*, 958 F.2d 1565, 1570 (11th Cir. 1992) (once a public official has shown that he or she was acting

within the scope of their discretionary duties, the ultimate burden of proof is on the plaintiff to show that the official is not entitled to qualified immunity); and *Rich v. Dollar*, 841 F.2d 1558, 1563 (11th Cir. 1988).

The Tenth Circuit's decision in this case is inconsistent with the decisions of this Court and other circuit courts because it literally shifts the burden to the public official asserting qualified immunity to show that he acted reasonably. Prior decisions of this Court and other circuit courts hold the burden of proof is upon the plaintiff to show both facts and law which establish that the defendant is not entitled to qualified immunity. Under the law as announced by this Court and other circuit courts, if after a motion for summary judgment asserting the defense of qualified immunity is fully briefed, the state of the record is such that it is unclear whether the defendant acted reasonably or not, and the question in this regard arises from an absence of evidence rather than conflicting evidence, the plaintiff has not met his or her burden and the defendant is entitled to qualified immunity as a matter of law.

II. THE TENTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT AND OTHER CIRCUIT COURTS OF APPEAL BECAUSE THE DOCTRINE OF *RESPONDEAT SUPERIOR* CANNOT BE USED TO IMPOSE LIABILITY AGAINST A MUNICIPALITY, OR A SUPERVISOR WHO ASSERTS THE QUALIFIED IMMUNITY DEFENSE.

As noted above, the Tenth Circuit placed the burden on Petitioner to show that he should not face a jury trial with regard to the actions taken by his subordinates. (App. A, *infra*, at 8a-9a). In doing so, the court ruled that Petitioner was responsible for the actions of his subordinates, unless he came forward with evidence which demonstrated that he should not be held liable for what they did. In so doing, the appeals court applied the doctrine of *respondeat superior* to Petitioner, which should not be permitted in a 42 U.S.C. § 1983 action.

The common law principal of *respondeat superior* makes an employer strictly liable, regardless of the presence or absence of fault on the employer' s part, for torts committed by his or her employees in furtherance of his or her business. See, *Rosenthal and Company v. Commodities Future Trading Commission*, 802 F.2d 963, 966 (7th Cir. 1986); *Prosser and Keeton On the Law of Torts*, § 70 (5th ed. 1984).

This Court has specifically held that even if there has been a violation of constitutional law by a subordinate, "`a municipality cannot be held liable under § 1983 on a *respondeat*

superior theory.'"). *Leatherman v. Tarrant County*, 507 U.S. 163, 166 (1993). See also, *Board of County Commissioners v. Brown*, 520 U.S. 397, 403 (1997) ("a municipality may not be held liable under § 1983 solely because it employs a tortfeasor."). In *Harris v. Greer*, 750 F.3d 618 (7th Cir. 1984) (Posner, J.), the Seventh Circuit noted that "there is no concept of supervisor strict liability under section 1983." The liability of a supervisor cannot be predicated on negligence. *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998); *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986).

In the present case, Petitioner, who was not at the scene, conferred with Sgt. Jordan and Sgt. Clark and, based upon their description of the situation, presumably authorized them to "attempt to move these people out of the street and allow a clear path for the people to leave and go to their cars on the south side of the street." (ER at 0031). The Tenth Circuit's ruling holds the Petitioner liable for everything that followed, which is an application of the doctrine of *respondeat superior*.

CONCLUSION

Proper application of the qualified immunity defense is an important public issue. The United States Court of Appeals for the Tenth Circuit has acted to deny the full benefits of the qualified immunity defense to public officials within its jurisdiction by improperly shifting the burden of proof to the public officials. The Tenth Circuit's decision in this regard is inconsistent with the decisions of this Honorable Court and the other circuit courts. This petition for a writ of certiorari should be granted to clarify the proper allocation of the burden of proof when a public official raises the defense of qualified immunity

and to preserve uniformity of decision among the circuit courts.

Respectfully submitted,

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JOHN E. DORMAN
Senior Assistant City Attorney

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APPENDIX
PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 99-5224

DERONN WRATHER; STEPHEN WILLIAMS AND VINCENT TURNER, PLAINTIFFS-APPELLEES,

v.

CITY OF TULSA: RON PALMER AND SUSAN SAVAGE, in their official capacity as City of Tulsa executive officers: TULSA POLICE DEPARTMENT: BILL YELTON; MICHAEL ECKERT; CHARLES JORDAN; STEVEN MIDDLETON; B. BONHAM; CHRIS WITT; SGT. JIM CLARK, in their official capacity as Tulsa Police Officers; and OTHER UNKNOWN PERSONS, individually and in their official capacities as Tulsa Police Officers; W.B. MAJOR; A CORPORAL; A. WILSON; AND KEVIN JOHNSON, individually and in their official capacity as Tulsa Police Officers, DEFENDANTS,

and

BILL YELTON, individually; MICHAEL ECKERT, individually; CHARLES JORDAN; STEVEN MIDDLETON, individually; B. BONHAM, individually; SGT. J. CLARK, individually; and W.B. YORK, individually and in his official capacity as a Tulsa Police Officer, DEFENDANTS-APPELLANTS.

ORDER AND JUDGMENT

[FILED: JANUARY 22, 2001]

BEFORE **BRORBY, KELLY, AND LUCERO,** CIRCUIT JUDGES.

Defendants-appellants W. B. York, Bruce Bonham, Bill Yelton. Michael Eckert, and Steven Middleton appeal the district court's denial of qualified immunity in this civil rights action. Because defendants-appellants are challenging the district court's conclusion that genuine factual disputes remain which affect the availability of qualified immunity.

we lack jurisdiction over this interlocutory appeal and therefore dismiss.[1]

On May 4, 1996, members of the Ku Klux Klan held a rally on the Tulsa County courthouse steps, to be followed by a cross burning on private land. After the rally had concluded, the Klansmen had been escorted to their cars, and the street had been reopened to traffic, a crowd of predominately African-Americans remained on a sidewalk approximately a block from the courthouse.

Tulsa police officers conferred with defendant-appellant York and decided to clear the crowd. The crowd was broken up through a combination of officers advancing into the crowd on horses, officers advancing in a skirmish line, pepper spray, and the arrest of uncooperative crowd members. Defendants-appellants Yelton, Bonham, Eckert, and Middleton participated in these actions. Plaintiffs were arrested during the dispersal of the crowd. Plaintiff Turner was arrested for disorderly conduct by defendant-appellant Bonham. Plaintiff Wrather, now married to plaintiff Turner, was arrested by defendant-appellant Eckert for obstructing officers, resisting arrest, and assaulting an officer. Plaintiff Williams was arrested for inciting a riot, assaulting an officer, and resisting arrest, by a number of officers, including defendant-appellant Middleton.

This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiffs filed an action against the City of Tulsa, the mayor, the police chief, and various police officers, alleging civil rights violations under the First, Fourth, and Fourteenth Amendments, and state law violations. All defendants filed motions for summary judgment, seeking qualified immunity for their conduct.

To show the existence of factual disputes, plaintiff Turner submitted an affidavit stating (1) that before police dispersed the crowd, people were peacefully assembled on the sidewalk, there were no threats of violence, and no one was asked to leave or given any warning before the horse attack; (2) that plaintiff Turner at no time made any loud or angry statements or failed to obey an order, and therefore was arrested without reason; and (3) that plaintiff Wrather did not interfere with Turner's arrest and thus was arrested without cause. Video evidence was also submitted, showing that before the horses arrived approximately ten Tulsa police officers were on the street facing a crowd of men, women, and children, predominately African-American, who were milling around on the sidewalk and grassy area, and were sitting on a concrete fence enclosing a parking lot. No angry threats or interchanges can be heard on the video tape, and the crowd's demeanor appears peaceful. The video then shows the Tulsa mounted police riding into the crowd, the skirmish line advancing. and the deployment of pepper spray. In the resulting chaos, the video shows several take-down arrests, including a struggle to get plaintiff Williams to the ground which ended with defendant-appellant Middleton kicking Williams in the head.

The district court considered each claim separately, and made several rulings relevant to this appeal: (1) regarding plaintiffs' claim that their First Amendment right to peaceably assemble had been violated, the district court dismissed claims against three police officers, but held there was a factual dispute as to the objective reasonableness of the

conduct of defendants-appellants York, Yelton, Eckert, Middleton, Bonham, and defendants Clark and Jordan;[2] (2) regarding plaintiffs' Fourth Amendment claims of false arrest and/or excessive violence, the district court dismissed claims against most of the officers, but denied qualified immunity on Turner's false arrest claims against defendant-appellant Bonham and defendant Clark, plaintiff Wrather's false arrest claim against defendant-appellant Eckert, and plaintiff Williams' excessive force claim against defendant-appellant Middleton; and (3) regarding the state law claims, the district court declined to enter summary judgment in favor of any of the defendants. Defendants-appellants York, Yelton, Eckert, Middleton, and Bonham have appealed these rulings, arguing they are entitled to qualified immunity as a matter of law.

We must examine whether we have jurisdiction over this interlocutory appeal. "Since federal courts are courts of limited jurisdiction, we presume no jurisdiction exists absent an adequate showing by the party invoking federal jurisdiction. If jurisdiction is challenged, the burden is on the party claiming jurisdiction to show it by a preponderance of the evidence." United States ex rel. Hafter v. Spectrum Emergency Care, Inc., 190 F.3d 1156, 1160 (10th Cir. 1999) (citations omitted).

An order denying qualified immunity is appealable before trial only if it involves "neat abstract issues of law." Johnson v. Jones, 515 U.S. 304, 317 (1995) (quotation omitted). When the district court's denial of qualified immunity rests on the existence of a genuine issue of fact which will determine the availability of the defense, the ruling is not immediately appealable under the collateral order doctrine. Id. at 310, 313-15 (affirming dismissal for lack of jurisdiction officers' appeal from denial of qualified immunity based on a factual dispute whether they engaged

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[2] Defendants Clark and Jordan originally appealed the court's ruling, but have since withdrawn their appeals

in beating, noting lack of separability from merits): Foote v. Spiegel, 118 F.3d 1416, 1422 (10th Cir. 1997) ("[G]overnment officials cannot appeal pretrial denial of qualified immunity to the extent the district court's order decides nothing more than whether the evidence could support a finding that particular conduct occurred."). Such a denial may be appealed as a question of law, however, if a defendant argues that even under the plaintiff's facts there was no violation of clearly established law. Johnson v. Martin, 195 F.3 d 1208, 1214-15 (10th Cir. 1999).

In this case, the district court denied summary judgment solely on the ground that plaintiffs' evidence created factual disputes whether the police conduct in breaking up the assembly and arresting several participants was objectively reasonable. Such a reasonableness inquiry precludes jurisdiction over defendants-appellants' claims on appeal. Myers v. Okla. County Bd. Of County Comm'rs, 80 F.3d 421, 425 (10th Cir. 1996) (holding district court's denial of qualified immunity was not immediately appealable when it rested solely on the existence of a factual dispute regarding the reasonableness of defendants' use of force).

Defendants-appellants York and Bonham attempt to cast their arguments as questions of law, however, arguing they cannot be held liable because they relied on information provided by other officers in making their decisions. An officer "'may rely on information furnished by other law enforcement officials to ... develop probable cause."' Baptiste, 147 F.3d at 1260. This is a question of fact.

Here, the record does not show what information was communicated to defendant-appellant York or to defendant-appellant Bonham. Without such information, the court cannot presume that the officers acted reasonably

simply because they relied on the observations of other officers. Because the district court denied qualified immunity based on a factual dispute regarding the reasonableness of York's and Bonham's decisions, and the officers do nothing more than challenge this ruling, we are without jurisdiction to review the denial. See. e.g., McFarland v. Childers, 212 F.3d 1178, 1184 (10th Cir. 2000) (holding court lacked jurisdiction when appellant's argument "requests this court to review the record to determine if the district court correctly interpreted the facts to find a genuine dispute") (quotations omitted).

The appeal is DISMISSED for lack of jurisdiction.

Entered for the Court

Carlos F. Lucero
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CASE NO. 97-CV-435-BU

DERONN WRATHER, STEPHEN WILLIAMS, & VINCENT TURNER, PLAINTIFFS,

V.

THE CITY OF TULSA, A MUNICIPAL CORPORATION, ET AL., DEFENDANTS.

ORDER

[FILED: OCTOBER 28, 1999]

Plaintiffs, Deronn Wrather, Stephen Williams and Vincent Turner, bring this civil action seeking damages pursuant to 42 U.S.C. § 1983 based upon events which occurred after a Ku Klux Klan rally in Tulsa, Oklahoma on May 4, 1996. Specifically, Plaintiffs allege that their constitutional rights under the First and Fourteenth Amendments were violated because they, along with other citizens, were attacked by foot patrol officers, horse mounted officers and pepper gas while peacefully assembled on a public sidewalk, so that Ku Klux Klan members and supporters could have exclusive use of the public sidewalk. Plaintiffs also claim that their constitutional rights under the Fourth Amendment were violated because they were arrested without probable cause. Plaintiffs, Deronn Wrather and Stephens Williams, further allege that their constitutional rights under the Fourth Amendment were violated because unreasonable and excessive force was used in effectuating their arrests. In addition to the § 1983 claims, Plaintiffs allege

state law claims of intentional infliction of emotional distress, assault and battery and malicious prosecution.

Presently before the Court are the motions of Defendants, Bill Yelton, Michael Eckert, Charles Jordan, Steven Middleton, B. Bonham, Chris Witt, Sgt. Jim Clark, Major W.B. York, Corporal A. Wilson, Kevin Johnson, Ron Palmer, Susan Savage and the City of Tulsa, for summary judgment pursuant to Rule 56 (c), Fed. R. Civ. P. Upon due consideration of the parties' submissions, the Court makes its determination.[1]

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing the record, the Court views the evidence and draws any inferences therefrom in the light most favorable to the party opposing summary judgment. Latta v. Keryte, 118 F.3d 693, 697 (10th Cir. 1997) (citing Coosewoon v. Meridian Oil Co., 25 F.3d 920, 929 (10th Cir. 1994)).

In their motions, the individual Defendants have raised the affirmative defense of qualified immunity as to Plaintiffs' § 1983 claims. When a public official raises the defense of qualified immunity on summary judgment, special rules apply. Hinton v. City of Elwood, Kansas, 997 F.2d 774, 779 (10th Cir. 1993). The plaintiff must initially make a two-fold showing. Id. First, the "'[p]laintiff has the

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[1] Plaintiffs have filed a Motion to Strike Defendants'Reply Briefs and an Opposed Application for Surreply. Upon review, the Court finds that Plaintiffs' Motion to Strike Defendants' Reply Briefs should be denied and the Plaintiffs' Opposed Application for Surreply should be granted.

"burden to show with particularity facts and law establishing the inference that defendant violated a constitutional right."'" Hollingsworth v. Hill, 110 F. 3d 733, 737 (10th Cir. 1997)(quoting Abeyta v. Chama Valley Indep. Sch. Dist., 77 F.3d 1253, 1255 (10th Cir. 1996) (quoting Walter v. Morton, 33 F.3d 1240, 1242 (10th Cir. 1994)). Second, the plaintiff must demonstrate that "'the constitutional rights . . . the defendant allegedly violated were clearly established at the time of the conduct at issue.'" Id. (quoting Albright v. Rodriguez, 51 F.3d 1531, 1534 (10th Cir. 1995)). Ordinarily, for the law to be "clearly established," there must be a Supreme Court or Tenth Circuit decision on point or the weight of authority from other circuits must be as the plaintiff maintains, and " [t] he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." V-1 Oil Co. v. Means, 94 F.3d 1420, 1422 (10th Cir. 1996) (quoting Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). If the plaintiff makes the required two-fold showing, the public official then bears the usual summary judgment movant's burden of showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. Hinton, 997 F.2d at 779. Specifically, the defendant must show that ""no material issues of fact remain as to whether the defendant's actions were objectively reasonable in light of the law and information the defendant possessed at the time of his-actions."'" Hollingsworth, 110 F.3d at 737 (quoting Guffey v. Wyatt, 18 F.3d 869, 871 (10th Cir. 1994) (quoting Salmon v. Schwarz, 948 F.2d 1131, 1136 (10th Cir. 1991)); see also, Hinton, 997 F.2d at 779.

Guided by the above principles, the Court turns first to Plaintiffs' First Amendment claim against the individual Defendants. The First Amendment to the Constitution provides in part that "Congress shall make no law ... abridging the ... right of the people peaceably to assemble."

This right has long been made applicable to the states by the Fourteenth Amendment. De Joncre v. Oregon, 299 U.S. 353, 364 (1937). "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." Id. People assemble in public places not only to speak or to take action, but also to listen, observe, and learn; indeed, they may "assembl[e] for any lawful purpose." Hague v. CIO, 307 U.S. 496, 519 (1939) (opinion of Stone, J.). Subject to the traditional time, place, and manner restrictions, see, Cox v. New Hampshire, 312 U.S. 569, 574-576 (1941); Cox v. Louisiana, 379 U.S. 559, 560-564 (1965), public streets, sidewalks, and parks are places traditionally open, where First Amendment rights may be exercised, see, Hague, 307 U.S. at 515 (opinion of Roberts, J.).

The Court finds that Plaintiffs have sufficiently shown facts from which a reasonable jury might conclude that a violation of their constitutional right to peaceably assemble may have occurred. Plaintiffs, through the affidavit of Plaintiff, Vincent Turner, reveal that they were peaceably assembled on a public sidewalk with other citizens after the Ku Klux Klan rally. In his affidavit, Mr. Turner testifies that when the Ku Klux Klan members were leaving the scene and immediately thereafter, some of the members of his group were yelling hostile comments. However, Mr. Turner testifies that these initial taunts quickly subsided. He also testifies that some ten to fifteen minutes later approximately eight police officers arrived at the scene and formed a line in front of the group. Mr. Turner testifies that no person or persons threatened the officers, charged the officers' line or made any hostile gestures to the police officers. Further, Mr. Turner testifies that there was no warning before the horse

attack and that when the horses entered the crowd the officers immediately sprayed O.C.[2] gas.

Although Plaintiffs have shown facts from which a reasonable jury may conclude that their First Amendment right to peaceful assembly was violated, the Court concludes that Plaintiffs have not shown that all of the Tulsa police officers named as Defendants in this action caused or contributed to the alleged violation of their First Amendment right. The Court has examined the record and viewing the evidence in a light most favorable to Plaintiffs, it appears that Defendants, Bill Yelton, Michael Eckert, Steven Middleton and B. Bonham, were part of the skirmish line that assisted in attempting to disperse the crowd. It also appears that Sgt. Jim Clark and Sgt. Charles Jordan conferred about the situation with Major W.B. York and they decided to disperse the crowd. It further appears that Sgt. Jim Clark and Sgt. Charles Jordan were involved in attempting to disperse the crowd. As to Defendants, Chris Witt, Kevin Johnson and Cpl. A. Wilson, there is no evidence in the record that they were involved in the skirmish line or were on mounted horses or sprayed pepper gas on the crowd. In regard to Cpl. A. Wilson, the record only shows that he advised Sgt. Jim Clark of the crowd gathered on the street and that later, he directed Officer Rodney Russo to arrest Shannon Johnson, one of the members of the crowd, for inciting a riot. There is no showing in the record by Plaintiffs that he was involved in dispersing the allegedly peaceful crowd. Because there is no showing by Plaintiffs that these individual Defendants violated their First Amendment right to peaceably assemble, the Court finds that these individual Defendants are entitled to qualified immunity on the First Amendment claim.

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[2] According to the record, the term O.C. stands for Oleoresin Capscium

As to the second part of Plaintiffs' two-part burden, the Court finds that clearly Plaintiffs have shown that the constitutional right to peaceably assemble on the public sidewalk was established in May of 1996. In Edwards v. South Carolina, 372 U.S. 229 (1963), and in Cox v. Louisiana, 379 U.S. 536 (1965), the Supreme Court overturned convictions for breach of the peace for black defendants who were marching peaceably on a public sidewalk to publicize their dissatisfaction with discriminatory actions against blacks. The Supreme Court found that the convictions in part violated the defendants' First Amendment rights of free assembly. The Supreme Court, in Edwards, noted that there was no violence or threat of violence on the part of the marchers or on the part of any member of the crowd watching them. It also noted that the marchers were not in violation of any law. The Supreme Court found that by marching peaceably on a public sidewalk and peaceably expressing their grievances, the defendants were exercising basic constitutional rights in their most pristine and classic form.

Because Plaintiffs have satisfied their two-part burden, the individual Defendants, Bill Yelton, Michael Eckert, Charles Jordan, Steven Middleton, B. Bonham, Sgt. Jim Clark, and Major W.B. York, have the burden to show no material issues of fact remain as to whether their actions were objectively reasonable in light of the law and information they possessed at the time of their actions. The Court, upon review, finds that Defendants have failed to satisfy their burden. The Court concludes that there are questions of material fact as to whether the individual Defendants' actions were objectively reasonable. The individual Defendants have presented evidence that the officers wanted to disperse the crowd in order to allow the Ku Klux Klan sympathizers to have access to their cars. The individual Defendants have submitted evidence to show that several members of the gathered crowd were in the street

kicking passing cars; that they were making threats to Ku Klux Klan sympathizers; that they had refused to move out of the street when directed by the officers; that they made threats against the officers; that they had been warned that horses would come in if they did not disperse and that the crowd still refused to disperse and responded with taunts against the officers. However, the affidavit testimony of Plaintiff, Vincent Turner, disputes such evidence. Therefore, because genuine issues of material fact remain in regard to the First Amendment claim, the Court finds that Defendants, Bill Yelton, Michael Eckert, Charles Jordan, Steven Middleton, B. Bonham, Sgt. Jim Clark, and Major W.B. York are not entitled to qualified immunity on that claim.

The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This Clause embodies "a general rule that States must treat like cases alike but may treat unlike cases accordingly." Vacco v. Quill, 521 U.S. 793, 117 S.Ct. 2293, 2297, 138 L.Ed.2d 834 (1997). Unless a legislative classification or distinction targets a suspect class, courts will uphold it if it is rationally related to a legitimate end. Id.

Plaintiffs, in this case, are African-Americans. Plaintiffs contend that the individual Defendants removed them from the public in order to give the white Ku Klux Klan sympathizers exclusive use of the sidewalk. The Court, however, finds that Plaintiffs have not shown that the individual Defendants targeted them because of their race. While it is true the crowd gathered on the public sidewalk were predominately black, the record in the case shows that white individuals were also a part of the crowd and that they, along with Plaintiffs, were subjected to the dispersement by foot officers, horse-mounted officers and pepper gas. Contrary to Plaintiffs' allegations, none of the

police officers' reports in the record indicate that the crowd was removed because of their race. Thus, Plaintiffs have not shown that the individual Defendants took action against Plaintiffs based upon their race.

The Court also finds that Plaintiffs have not met their burden of showing a constitutional violation under the Equal Protection Clause as they have not shown that the individual Defendants treated them differently than others similarly situated The allegation that a plaintiff was treated differently from those similarly situated is an essential element of an equal protection claim. Hennigh v. City of Shawnee, 155 F.3d 1249, 1257 (10th Cir. 1998); see also, Gehl Group v. Koby, 63 F.3d 1528, 1538 (10th Cir. 1995). Therefore, because Plaintiffs have failed to show that they were treated differently than those similarly situated, the Court finds that the individual Defendants are entitled to qualified immunity on Plaintiffs' Fourteenth Amendment claims.

In the Second Amended Complaint, Plaintiffs allege that they were arrested without probable cause in violation of the Fourth Amendment. The Fourth Amendment guarantee of an individual's right not to be arrested without probable cause was clearly established long before Plaintiffs' arrests. Beck v. Ohio, 379 U.S. 89, 91 (1964). An arrest without a warrant is proper as long as the arresting officer has probable cause to believe that the arrestee has committed a crime. Romero v. Fay, 45 F.3d 1472, 1476 (10th Cir. 1995). A defendant is "entitled to immunity if a reasonable officer could have believed that probable cause existed to arrest" a plaintiff. Hunter v. Bryant, 502 U.S. 224, 228 (1991). "Probable cause exists if facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to lead a prudent person to believe that the arrestee has committed or is committing an offense." Jones

v. City & County of Denver, 854 F.2d 1206, 1210 (10th Cir. 1988).

As to Plaintiff, Vincent Turner, the Court finds that Plaintiff has presented facts from which a reasonable jury may conclude that he was arrested without probable cause. According to the record, Plaintiff was arrested for disorderly conduct. In his affidavit, Plaintiff testifies that he never stated a loud or angry word to any person. He also testifies that no police officer asked him to leave. Plaintiff testifies that at no time did he fail to obey an order nor did he encourage another person to fail to obey an order. Plaintiff further testifies that police officers simply grabbed him and handcuffed him without reason and warning.

The Court notes that Plaintiff, Vincent Turner, has not identified the individual Defendants who were involved in his arrest. The record in this case reveals that Defendant, Sgt. Jim Clark, ordered Defendant, B. Bonham, to arrest Plaintiff. As to the individual Defendants, Bill Yelton, Michael Eckert, Charles Jordon, Steven Middleton, Chris Witt, Major W.B. York, Cpl. A. Wilson and Kevin Johnson, Plaintiff has failed to allege facts to show that they violated Plaintiff's constitutional right under the Fourth Amendment to be free from false arrest. Plaintiff has failed to present any evidence that any of these individual Defendants were involved in Plaintiff's arrest. Moreover, Plaintiff has failed to demonstrate that any of these Defendants had an opportunity to intervene in preventing the arrest. See, Mick v. Brewer, 76 F.3d 1127, 1136 (10th Cir. 1996); Lusby v. T.G. & Y. Stores, Inc., 749 F. 2d 1423, 1433 (10th Cir. 1984) (ruling that officer who did not prevent fellow officer's use of allegedly excessive force against arrestee "may be liable [under § 1983] if he had the opportunity to intervene but failed to do so"), vacated on other grounds, 474 U.S. 805, 106 S.Ct. 40, 88 L.Ed.2d 33 (1985). The Court, therefore, concludes that the individual Defendants,

Bill Yelton, Michael Eckert, Charles Jordan, Steven Middleton, Chris Witt, Major W.B. York, Cpl. A. Wilson and Kevin Johnson, are entitled to qualified immunity on Plaintiff's Fourth Amendment claim for false arrest.

As to the individual Defendants, Sgt. Jim Clark and B. Bonham, the Court finds that they are not entitled to qualified immunity. Plaintiff has satisfied his two-fold burden of alleging a constitutional violation and that the law was clearly established at the time of his arrest. The Court concludes that Defendants have not demonstrated that no genuine issues of material fact exist as to whether Defendants' conduct was objectively reasonable in light of the law. Although Defendants rely upon police records to establish probable cause, the Court, in light of Plaintiff's affidavit, concludes that genuine issues of fact exist as to whether probable cause existed to arrest Plaintiff for disorderly conduct.

In their motion, Defendants, citing to Baptiste v. J. C. Penney Co., 147 F. 3d 1252, 1260 (10th Cir. 1998), contend that Defendant, B. Bonham, is entitled to qualified immunity because he reasonably relied upon information received from Defendant, Sgt. Jim Clark, to arrest Plaintiff, Vincent Turner. From the record in this case, the Court, however, cannot say as a matter of law that Defendant, B. Bonham reasonably relied on Defendant, Sgt. Jim Clark's order to arrest Plaintiff. All the Court can glean from the record is that Defendant, Sgt. Jim Clark, ordered Defendant, B. Bonham, to arrest Plaintiff and acting on that order Defendant, B. Bonham arrested Plaintiff. The Court is not aware of the communication between Defendants in regard to the order to arrest. For example, the Court does not know if Sgt. Jim Clark explained the circumstances which led him to believe that Plaintiff should be arrested for disorderly conduct. In the absence of facts speaking to the reasonableness of Defendant, B. Bonham's reliance on the

order to arrest, the Court concludes that Defendant, B. Bonham, is not entitled to summary judgment on Plaintiff's false arrest claim. Saffold v. City of Calumet Park, Illinois, 47 F.Supp.2d 927, 935 (N.D. I11. 1999).

As to Plaintiff, Deronn Wrather, the Court finds that Plaintiff has presented facts from which a reasonable jury may conclude that Defendant, Michael Eckert, violated her Fourth Amendment right to be free from false arrest. The record shows that the reason Defendant, Michael Eckert, approached Plaintiff, Deronn Wrather, was to arrest her for the misdemeanor crime of obstructing officers. Plaintiff, through the affidavit of Plaintiff, Vincent Turner, has alleged that although she initially had her hands on Mr. Turner's legs, she still allowed the officers to move forward. She has also alleged that she then yelled "no, no, no" and without warning was grabbed by Defendant, Michael Eckert.

The Court notes that Plaintiff, Deronn Wrather, has only identified Defendant, Michael Eckert, as the person involved in her arrest. Plaintiff has not alleged any facts to show that Defendants, Bill Melton, Charles Jordan, Steven Middleton, B. Bonham, Chris Witt, Sgt. Jim Clark, Major W.B. York, Cpl. A. Wilson and Kevin Johnson, violated Plaintiff's constitutional right under the Fourth Amendment to be free from false arrest. Plaintiff has failed to show that any of these individual Defendants were involved in Plaintiff's arrest in any manner. Bennett v. Passic, 545 F.2d 1260, 1262-63 (10th Cir. 1976)(plaintiff must show defendant personally participated in the alleged violation to state a claim under § 1983). Moreover, Plaintiff has failed to show that any of these Defendants had an opportunity to intervene in preventing the arrest. Lusby, 749 F.2d at 1433. The Court, therefore, concludes that the individual Defendants, Bill Melton, Charles Jordan, Steven Middleton, B. Bonham, Chris Witt, Sgt. Jim Clark, Major W.B. York,

Cpl. A. Wilson and Kevin Johnson, are entitled to qualified immunity on Plaintiff's Fourth Amendment claim for false arrest.

As to Defendant, Michael Eckert, the Court finds that he is not entitled to qualified immunity. Plaintiff has satisfied his two-fold burden of alleging a constitutional violation and that the law was clearly established at the time of his arrest. The Court concludes that Defendant has not satisfied his burden that no genuine issues of material fact exist as to whether Defendant's conduct was objectively reasonable. The Court notes that Defendant has not set forth the elements for the misdemeanor crime of obstructing officers. At Stephen Williams, trial, Defendant testified that Plaintiff was arrested because she was interfering with Mr. Turner's arrest by prohibiting the officers from performing the handcuffing duties.[3] However, Defendant also testified that he was not certain that the officers were attempting to get the handcuffs on him. The videotapes submitted by Plaintiff do not show her prohibiting the officers from performing the handcuffing duties. Defendant, however, also testifies that Plaintiff was backed up to her husband and had her arms behind her. On the record before it, however, the Court cannot determine whether these facts and any other facts that Defendant may have had knowledge of would lead a prudent person to believe that Plaintiff was committing the misdemeanor crime of obstructing officers in his presence. Therefore, the Court finds that Defendant, Michael Eckert, is not entitled to qualified immunity on Plaintiff's Fourth Amendment claim for false arrest.

In regard to Plaintiff, Stephen Williams, Defendants maintain that Plaintiff is precluded from re-litigating the issue of probable cause for his arrest in this case as such

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[3] In his arrest report, Defendant, Michael Eckert, also states that Plaintiff tried to keep officers from placing handcuffs on Plaintiff, Vincent Turner.

issue was previously determined in Plaintiff's criminal proceeding. Defendants, in support of their position, rely upon Hubbert v. City of Moore, 923 F.2d 769 (10th Cir. 1991), wherein the Tenth Circuit ruled that the plaintiffs in a civil rights action were precluded from re-litigating the issue of probable cause for their arrest because the issue had been decided during a preliminary hearing in an earlier criminal proceeding. In reaching its decision in Hubbert, the Tenth Circuit relied upon Adamson v. Dayton Hudson Corp., 774 P.2d 478 (Okla.Ct.App. 1989), which held that a finding of probable cause at a preliminary hearing precluded a plaintiff in a civil suit for false arrest from re-litigating the issue of probable cause. Since the Hubbert decision, the Oklahoma Supreme Court has addressed the issue and has also determined that an order at a preliminary hearing binding over a defendant for criminal trial precludes a plaintiff from re-litigating the issue of probable cause in a subsequent civil suit for false arrest following acquittal. Christopher v. Circle K Convenience Stores, Inc., 937 P.2d 77 (Okla. 1997).

In the instant case, Defendants assert that by overruling Plaintiff's demurrer to the state's evidence, the judge in the criminal proceeding necessarily determined under Oklahoma law, see, State v. Williams, 307 P.2d 163 (Okl.Cr. 1957), that there was proof tending reasonably to sustain the allegations of the charges. As the judge made such determination, Defendants contend that he made a finding of probable cause and Plaintiff cannot re-litigate the issue of probable cause in this case.

Plaintiff, in response, contends that Hubbert is distinguishable from this case as no preliminary hearing was held in Plaintiff's criminal case because he was charged with misdemeanor crimes. Plaintiff asserts that his arrest was not contested at trial. He also contends the Oklahoma Supreme Court in Williams made no distinction between a demurrer and a directed verdict and a directed verdict is regarded as

demurrer. Plaintiff contends that the judge sustained his motion for directed verdict after viewing the Eckert #1 videotape of the scene.

Upon review, the Court finds that Plaintiff is precluded from re-litigating the issue of probable cause. Even though a preliminary hearing was not held in the criminal proceeding, the Court concludes that the trial judge, in overruling the demurrer to the state's evidence, inherently made a finding of the existence of probable cause.[4] Under Oklahoma law, to withstand a directed verdict or demurrer, there must be competent evidence reasonably tending to sustain the allegations of the charges. Winrow v. State, 645 P.2d 1019 (Okl.Cr. 1982). The Court finds that Plaintiff had the opportunity to fully and fairly litigate the issue of probable cause prior to the judge's finding as he had the opportunity to fully cross-examine witnesses. The Court therefore concludes that Plaintiff is precluded from re-litigating the issue of probable cause. Because Plaintiff cannot show that he was arrested without probable cause, the Court finds Plaintiff has failed to satisfy his initial two-fold burden and summary judgment in favor of the individual Defendants on Plaintiff, Stephen Williams, false arrest claim is appropriate.

Plaintiffs, Deronn Wrather and Stephen Williams, also allege a Fourth Amendment claim of excessive force. To analyze a Fourth Amendment excessive force claim, the district court begins by "identifying the specific constitutional right allegedly infringed by the challenged application of force." Id. (quoting Graham v. Connor, 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)). The Tenth Circuit has determined that the Fourth Amendment provides constitutional protection from

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[4] The Court also notes that prior to Plaintiff's criminal trial, the trial judge overruled a motion to dismiss filed by Plaintiff.

excessive force after a warrantless arrest but before judicial determination of probable cause to arrest. Pride v. Does, 997 F.2d 712, 716 (10th Cir. 1993). Under the Fourth Amendment, the district court must look to whether the officer's action was "objectively reasonable" in light of all the facts and circumstances, without regard to the officer's subjective motivations. Id.

In Graham, the Supreme Court explained,

> the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . . With respect to a claim of excessive force. . . [n] ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers . . .violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation.

Graham, 490 U.S. at 396-397, 109 S.Ct. at 1872. Relevant factors in determining whether the force used by an arresting officer was objectively reasonable include the severity of the crime, whether the subject posed an immediate threat to the safety of the officer, and whether the subject was resisting arrest. Id.

Initially, the Court notes that in support of her claim that the force used by Defendant, Michael Eckert, was excessive, Plaintiff relies solely upon the Eckert #1 videotape and the opinion of her expert, Lou Reiter.

According to Mr. Reiter, Defendant, Michael Eckert, used "unreasonable force in his control" of Plaintiff. The Court, however, declines to consider this expert opinion as the Court finds such evidence would not be admissible at trial. Fed. R. Evid. 704 (a) provides that " [t] estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." While Rule 704 has abolished the common law "ultimate issue" rule, however, it has not "lower[ed] the bars so as to admit all opinions." Fed. R. Evid. 704 advisory committee's note. The advisory committee's note to Rule 704 illuminates the distinction between admissible and excludable expert's opinion testimony:

> Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence that wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution? would be allowed.

Fed.R.Evid. 704 advisory committee's note.

In this case, Mr. Reiter simply tenders the legal conclusion that Defendant, Michael Eckert's use of force was

"unreasonable." The Court finds that this conclusion crosses the line provided by Rule 704. Mr. Reiter's opinion merely tells the factfinder what result to reach on Plaintiff's excessive force claim. In other words, it invades the province of the factfinder. The Court finds that Mr. Reiter's opinion is different from the testimony given by the expert in Zuchel v. City and County of Denver, 997 F.2d 730 (10th Cir. 1993), which was found to be admissible. In that case, the expert had testified that the use of deadly force was inappropriate based upon his understanding of generally accepted police custom and practice. Id. at 742-743. The Tenth Circuit found that such testimony was permissible finding that an expert may testify as to whether the conduct at issue fell below accepted standards in the field of law enforcement. Id. at 742. In this case, Mr. Reiter, in proffering his opinion, has not informed the court that he is opining in regard to the prevailing standards in the field of law enforcement. Rather, he has only opined that Defendant, Michael Eckert's conduct, was unreasonable and such opinion, in the Court's view, invades the province of the factfinder. Any factfinder would be capable of assessing the reasonableness of Defendant, Michael Eckert's conduct. Because the Court finds that the opinion crosses the line provided by Rule 704, the Court concludes that such opinion would be inadmissible at trial and must be disregarded for summary judgment purposes. Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179, 1181 (9th Cir. 1988)(trial court may consider only admissible evidence in ruling on a motion for summary judgment).

As Mr. Reiter's testimony is disregarded, the only evidence in support of Plaintiff's excessive force claim is the Eckert #1 videotape. Upon review of the videotape, the Court concludes that Plaintiff has failed to show that Defendant, Michael Eckert, used unreasonably and excessive force in taking her to the ground. Although Plaintiff was being arrested for a misdemeanor crime and did not pose an immediate threat to the safety of Defendant,

Michael Eckert, the videotape submitted by Plaintiff shows that she was in fact resisting her arrest. Before Defendant, Michael Eckert, took Plaintiff to the ground, she was trying to get away and when Defendant grabbed her from behind, she swung her right hand back and hit him. The Court finds that the force used by Defendant, Michael Eckert, was objectively reasonable. Therefore, the Court finds that Defendant, Michael Eckert, is entitled to qualified immunity on Plaintiff's Fourth Amendment excessive force claim.

As to the excessive force claim of Plaintiff, Stephen Williams, the Court has also disregarded the opinion of Mr. Reiter for the reasons above stated. Consequently, the only evidence relied upon by Plaintiff is the Witt #1 videotape. Upon review of the videotape, the Court finds that Plaintiff has shown facts from which a reasonable jury may conclude that Defendant, Steven Middleton, applied excessive force in kicking Plaintiff. The videotape shows Defendant, Steven Middleton, kicked Plaintiff in the head. At the time of the kick, Plaintiff was on the ground and being held by the police officers. There appears no reason from the videotape for the kick. The Court also finds that Defendant has not established his burden of showing no genuine issues of material fact exist that Defendant's conduct was objectively reasonable. Defendant has presented testimony that he kicked Plaintiff because he was going to bite another officer. However, such testimony was presented for the first time in the individual Defendants' reply brief. As Plaintiff has not had an opportunity to respond to such testimony, the Court concludes that such evidence is not properly considered in determining whether summary judgment is appropriate. Therefore, the Court concludes that Defendant, Steven Middleton, is not entitled to qualified immunity on Plaintiff's Fourth Amendment excessive force claim.

In regard to the other challenged uses of force applied to Plaintiff, Stephen Williams, i.e., the pepper spray, the

neck restraint/chokehold, and the standing on one foot, the Court finds that Plaintiff has failed to show that such uses of forces were unreasonable. The Witt #1 videotape shows that Plaintiff was in fact resisting arrest. Plaintiff was swinging his arms and trying to get away from three of the police officers who were trying to get control of him. It took 5 to 6 officers to get Plaintiff to the ground. The use of the pepper spray, the neck restraint/chokehold and holding down of one foot was not unreasonable. As to the use of a neck restraint/chokehold, the Court notes that the Tenth Circuit has previously found such use to be reasonable. Pride, 997 F.2d at 717.

Defendants, Susan Savage and Ron Palmer, also challenge Plaintiffs' 1983 claims. As the Court has found that Plaintiffs have failed to prove they were denied equal protection under the Fourteenth Amendment, Plaintiff, Deronn Wrather, has failed to prove she was subjected to the use excessive force in effectuating her arrest and Plaintiff, Stephen Williams, has failed to prove he was arrested without probable cause against the Tulsa police officers, the Court finds that these claims against Defendants, Susan Savage and Ron Palmer, as supervisors of these police officers also fail.[5]

In regard to the other § 1983 claims, the Court finds that Defendants, Susan Savage and Ron Palmer, are entitled to summary judgment. The Supreme Court has instructed that a person in a supervisory role cannot be held liable under § 1983 upon a theory of respondeat superior. See, City of Canton v. Harris, 489 U.S. 378, 385 (1989). In other

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[5] By definition, the predicate to supervisory liability is the existence of a constitutional violation. That is, a supervisor may be liable only if there is an "'affirmative link' between the constitutional violation and the supervisor's own actions or failure to supervise." Mee v. Ortega, 967 F.2d 423, 431 (10th Cir. 1992)(citing Meade v. Grubbs, 841 F.2d 1512, 1527 (10th Cir. 1988)).

words, to prevail on a 1983 claim, it is not sufficient for a plaintiff to show that a defendant was in charge of the actors who actually committed a violation. Just as with any individual defendant, the plaintiff must show a deliberate, intentional act by the supervisor to violate constitutional rights. Woodward v. City of Worland, 977 F.2d 1392, 1399 (10th Cir.), cert. denied, 509 U.S. 923 (1993). A plaintiff may satisfy this standard by showing personal direction of or actual knowledge and acquiescence of the violations. Id. at 1400 (citing Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990).

The Court finds that Plaintiffs have failed to show personal participation and/or direction by Defendants, Susan Savage and Ron Palmer, in the alleged constitutional violations. Neither Defendant was present on scene during the alleged events. Indeed, Defendant, Ron Palmer, was out of town when the challenged events occurred.

In addition, the Court finds that Plaintiffs have failed to present sufficient evidence to establish that Defendant, Susan Savage, acquiesced in the alleged constitutional violations. The Supreme Court has held that a supervisor is not liable under § 1983 for constitutionally-proscribed misconduct by their subordinates unless the plaintiff demonstrates "[a]n affirmative link between the occurrence of the . . . misconduct and the adoption of any plan or policy--express or otherwise--showing [the supervisor's] authorization or approval of such misconduct." Rizzo v. Goode, 423 U.S. 362, 371 (1976). Upon review of the record, the Court concludes that Plaintiffs have failed to present sufficient evidence to raise a genuine issue of fact as to whether Defendant, Susan Savage, adopted a plan or policy which authorized or approved of the alleged misconduct in this case. Plaintiffs assert that Defendant, Susan Savage, had established a policy of routing approximately 400 to 500 citizen complaints through the

City of Tulsa's legal division, whose attorneys also represented the City and its employees, rather than having such complaints independently investigated and had also established a policy of not investigating citizens complaints of racial discrimination against Defendant, Ron Palmer. The Court, however, finds that even if such alleged policies did exist, they do not show an authorization or approval by Defendant, Susan Savage, of the remaining alleged constitutional violations in this case.

To the extent Plaintiffs attempt to argue that Defendant, Susan Savage, should be held liable because she stated in a letter to a constituent, Andrea Anderson, three days after the Ku Klux Klan rally, that the police officers acted appropriately and she testified in deposition that she was satisfied the situation was handled appropriately by the police officers, the Court finds that such action does not give rise to supervisory liability. Such action occurred days and months after the alleged constitutional violations by the police officers. In order to prevail under § 1983, a plaintiff must show that a defendant caused or contributed to the alleged constitutional violation. Jenkins v. Wood, 81 F.3d 988, 944 (10th Cir. 1996). Clearly, the letter and/or the deposition testimony did not cause or contribute to the remaining alleged constitutional violations.

The Court further finds that Plaintiffs have failed to establish liability on the part of Defendant, Susan Savage, on the basis that she failed to intervene. The Tenth Circuit has ruled that in order to be liable under § 1983 based upon a failure to intervene, a person must have had an opportunity to intervene but failed to do so. Lusby, 749 F.2d at 1433. In this case, Plaintiffs have not shown that Defendant, Susan Savage, had an opportunity to intervene to stop the alleged unconstitutional acts. When the Tulsa police officers began dispersing the crowd, Defendant, Susan Savage, was on the eleventh floor of the Tulsa City Hall building, looking out

her window. There is no evidence that from her location, she could have stopped the Tulsa police officers from allegedly dispersing peaceably assembled crowd and/or could have stopped the officers from allegedly arresting Plaintiffs without probable cause, or could have prevented Plaintiff, Stephen Williams, from allegedly being subjected to the use of excessive force. The Court, therefore, finds that Defendant, Susan Savage, is entitled to summary judgment on Plaintiffs' constitutional claims.

As to Defendant, Ron Palmer, Plaintiffs also seek to impose supervisory liability based upon certain policies he maintained. Plaintiffs contend that Defendant, Ron Palmer, approved for distribution a written policy entitled Command Strategies and Control Tactics for Unusual Occurrences and Civil Disturbances, which delegated to the field commander the power to determine whether to disperse a relatively peaceful crowd in the event of an civil disorder and which permitted police officers to arrest those who failed to disperse. Plaintiffs contend that the police officers were acting pursuant to this policy when they forcefully removed Plaintiffs from the public sidewalk and such removal resulted in the violation of their constitutional rights. The Court, however, finds that Plaintiffs have failed to establish an affirmative link between the alleged misconduct and the written policy. The written policy does not authorize or approve of the dispersement of a crowd, which is relatively peaceful, unless there is a civil disorder. In this case, Plaintiffs maintain that the alleged misconduct of the police officers was removing Plaintiffs from the public sidewalk when they and other citizens were peaceably assembled and there was no violation of any ordinance or statute and there were no threats of violence. Under such alleged facts, the crowd's removal would not have been in accordance with Defendant, Ron Palmer's written policy. Therefore, the Court finds that Plaintiffs cannot establish that Defendant

acquiesced in the alleged misconduct through the existence of the written policy.

Plaintiffs also claim that Defendant, Ron Palmer, maintained an unwritten policy that racial discrimination was acceptable and such policy authorized the alleged misconduct in this case. The Court, however, again finds that Plaintiffs have failed to demonstrate an affirmative link between the alleged misconduct and the alleged policy. There is no evidence in the record that Plaintiffs, Vincent Turner and Deronn Wrather, were arrested without probable cause because of their race or that Plaintiff, Stephen Williams, was subjected to the alleged excessive force because of his race. There is also insufficient evidence to show that Plaintiffs and the other citizens were allegedly attacked by foot patrol officers, horse mounted officers and pepper gas because of their race. Plaintiffs allege that the police officers' reports demonstrate a racially-motivated justification for their actions. However, having reviewed the reports, the Court finds no mention of the citizens being removed because of their race or that race played any part in the police officers' actions. As previously discussed in regard to Plaintiff's equal protection claims, both black and white citizens were in the crowd and were subjected to the challenged attack. Therefore, the Court finds that Plaintiffs have failed to show an affirmative link between the alleged misconduct and the alleged unwritten policy of acceptance of racial discrimination by Defendant, Ron Palmer.

In addition, Plaintiffs seek to impose supervisory liability upon Defendant, Ron Palmer, on the ground that after viewing the Eckert #1 videotape, he testified in this case that the police officers acted appropriately. However, such testimony, occurring during this lawsuit, cannot result in supervisory liability under § 1983. Defendant, Ron Palmer's testimony did not in any way cause or contribute to the alleged unconstitutional acts. Jenkins, 81 F.3d at 944.

There is no "affirmative link" or direct nexus between his-testimony and the alleged misconduct.

Further, Plaintiff, Stephen Williams, seek to impose supervisory liability on the basis that Defendant, Ron Palmer, failed to train Defendant, Steven Middleton, in regard to the use of excessive force. Plaintiff contends that Defendant had prior knowledge of a complaint by a citizen that Defendant, Steven Middleton, broke down her door and that he had received a letter of reprimand for failing to maintain his temper and that he had two additional charges of excessive force which resulted in exoneration.

The inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. City of Canton, 489 U.S. at 388. Deliberate indifference exists when the supervisor has actual or constructive notice of a deficiency the training program and does nothing, or, in a narrow range of circumstances, when the supervisor fails to train an employee in specific skills needed to handle recurring situations that present an obvious potential for constitutional violations. Barnet v. Pulsipher, 143 F.3d 1299, 1308 (10th Cir. 1998.)

In the instant case, the Court finds that Plaintiff has failed to show that Defendant, Ron Palmer, acted with deliberate indifference to their constitutional rights. Although Plaintiff contends that Defendant had notice of a previous incident where Defendant, Steven Middleton, broke down a door and had notice of two previous complaints of which Defendant, Steven Middleton, was exonerated, the Court concludes that the notice of such incidents does not establish actual or constructive notice that Defendant, Steven Middleton, would kick Plaintiff, Stephen Williams, and that there was a deficiency in his training in

that regard. Therefore, the Court concludes that Defendant, Ron Palmer, may not be held liable under § 1983 for Plaintiff's excessive force claim based upon a failure to train.

Plaintiffs also seek to recover damages against the City of Tulsa under § 1983. As the Court has found that Plaintiffs have failed to prove a violation of their equal protection right under the Fourteenth Amendment, Plaintiff, Deronn Wrather, has failed to prove a violation of the right to be free from excessive force under the Fourth Amendment and Plaintiff, Stephen Williams, has failed to prove a violation of the right to be free from false arrest under the Fourth Amendment against the Tulsa police officers, the Court finds that these claims against Defendant, City of Tulsa, also fail. It is well-settled that a city may not be held liable absent a constitutional violation by its officers. Thompson v. City of Lawrence, 58 F.3d 1511, 1517 (10t' Cir. 1995).

Turning to the remaining §1983 claims, the Court notes that a city may be liable under §1983 only for its own constitutional or illegal policies and not for the tortious acts of its employees. Monell v. Department of Soc. Servs., 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-38, 56 L.Ed.2d 611 (1978). The Supreme Court has instructed that a municipality is liable only when an official policy is the "moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and deprivation of federal rights." Board of County Comm'rs v. Brown, 520 U.S. 397, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997).

Only municipal officials, who have "final policymaking authority, " by their actions may subject the municipality to § 1983 liability. City of St. Louis v.

Praprotnik, 485 U.S. 112, 123, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). Nonetheless, the Supreme Court has identified two situations where a municipality may be found liable even though the action was by someone not a final policymaker. First, "egregious attempts by local governments to insulate themselves from liability for unconstitutional policies are precluded ... [if plaintiff proves] the existence of a widespread practice, that although not authorized by written law or express municipal policy, is so 'permanent and well settled as to constitute a "custom or usage" with the force of law." Praprotnik, 485 U.S. at 127. Second, when the municipality's authorized policymakers "approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." Id.

In the instant case, the Court finds that Plaintiffs have failed to establish the existence of a widespread practice constituting a custom or policy of Defendant, City of Tulsa, which caused the alleged deprivation of Plaintiffs' constitutional rights. While Plaintiffs, as previously discussed, have alleged that Defendant, Susan Savage, established certain customs and policies regarding the handling of citizens complaints, Plaintiffs have failed to demonstrate that such alleged customs and policies were the "moving force" behind Plaintiffs' alleged injuries.

Although Plaintiffs have not established the existence of a custom or policy of the City of Tulsa which was the moving force behind Plaintiffs' alleged injuries, Plaintiffs nevertheless argue that Defendant, City of Tulsa, still remains liable for their § 1983 claims. Plaintiffs specifically contend that Defendant, Susan Savage, as the final policymaker for Defendant, City of Tulsa, ratified the alleged unconstitutional acts of the police officers by her May 9, 1996 letter to constituent, Andrea Anderson, and through her deposition testimony in this case, and therefore, such acts are chargeable

to the City of Tulsa. As previously stated, if an authorized policymaker approves a subordinate's decision and the basis for it, her ratification will be chargeable to the municipality. Praprotnik, 485 U.S. at 127.

Defendant, City of Tulsa, responds that it may not be held liable under a ratification theory as Plaintiffs have not provided any evidence that Defendant, Susan Savage, ratified any of alleged unconstitutional acts of the police officers. Defendant asserts that it is undisputed that Defendant, Susan Savage, did not have all the information regarding the events at the time of her letter. Defendant asserts that there was no information in the police reports reviewed by Defendant, Susan Savage, which would have indicated that a constitutional violation occurred. Furthermore, Defendant contends that there is no evidence that Defendant, Susan Savage, was aware of the basis for any of the officers' alleged unconstitutional acts.

Upon review, the Court concludes that Defendant, City of Tulsa, may not be held liable under § 1983 based upon any purported ratification by Defendant, Susan Savage, of the police officers' actions. As the record reveals, Defendant, Susan Savage's purported ratification occurred days and even years after the events alleged in this case. Plaintiffs have not cited to any authority which would impose municipality liability under § 1983 based upon a final policymaker's ratification of events days and years after their occurrence. As the Supreme Court has instructed, a plaintiff must demonstrate "a direct causal link between the municipal action and deprivation of federal rights." Board of County Comm'rs, 520 U.S. at 404; see also, City of Canton, 489 U.S. at 385.

In the Tenth Circuit cases which have addressed and applied the ratification theory, there was a direct causal link between the final policymaker's approval of an employee's

action and the deprivation of a federal right. In those cases, the final policymaker had discussed with the employee the proposed action to be taken and was aware of the impermissible action and approved such action. See, e.g., Butcher v. City of McAlester, 956 F.2d 973, 977 (l0th Cir. 1992) (employee made recommendations for personnel actions which were approved by final policymaker; employee and final policymaker were in constant communication with each other and final policymaker aware of impermissible motives); Ware v. Unified School District No. 492, 902 F.2d 815 (10th Cir. 1990) (final policymaker knew employee's recommendation of personnel action was in retaliation for plaintiff's speech and approved recommendation); Melton v. City of Oklahoma City, 879 F.2d 706, 724 (10th Cir. 1989)(testimony indicated that the supervisor discussed the proposed dismissal of plaintiff with subordinate and approved such dismissal). However, in the instant case, there is no evidence that Defendant, Susan Savage, had discussed the proposed action to be taken by the individual police officers prior to the challenged acts. There is also no evidence in the record that she knew the alleged unconstitutional basis for the actions.

As previously stated, Plaintiffs assert that Defendant, Susan Savage, ratified the alleged unconstitutional acts of the police officers in her May 9, 1996 letter to Andrea Anderson. However, there is no evidence in the record that Defendant, Susan Savage, had any information which would have indicated that the alleged acts of the police officers were unconstitutional. There is also no evidence in the record which demonstrates that she adopted any alleged unconstitutional motives of the police officers. Butcher, 956 F.2d at 978 (ratification requires that the final policymaker know of and approve an employee's actions and adopt the employee's unconstitutional motive). The Court therefore concludes that Plaintiffs cannot show a direct causal link

between Defendant, Susan Savage's alleged ratification and the alleged deprivation of federal rights.

As to Defendant, Susan Savage's purported ratification during this lawsuit after viewing all of the evidence including the Eckert #1 videotape, the Court finds such ratification is not sufficiently established. Although Defendant, Susan Savage, after viewing the Eckert #1 videotape, testified that she did not see anything on the videotape which struck her as inappropriate, she also testified that if a formal complaint was received and investigated and determined that there was in fact problems, those police officers would be disciplined. Thus, the Court concludes that the record does not disclose that Defendant, Susan Savage, approved any alleged unconstitutional motives of the police officers, thereby making the alleged unconstitutional acts of the police officers chargeable to Defendant, City of Tulsa. Additionally, for the reasons previously stated in connection with the May 9, 1996 letter to Andrea Anderson, Plaintiffs have failed to establish the requisite direct causal link. Consequently, the Court finds that summary judgment is appropriate as to Plaintiffs' remaining §1983 claims against Defendant, City of Tulsa.

Defendants contend that they are entitled to summary judgment on Plaintiffs' state law claims for assault and battery, intentional infliction of emotional distress and malicious prosecution. Defendants contend that the same arguments they have made in regard to their §1983 claims applies with equal force to the state law claims. However, the Court, upon review, declines to grant summary judgment on the state claims. Defendants have not properly shown that no genuine issues of fact apply as to these claims. Defendants have simply provided the Court with conclusory allegations that summary judgment is appropriate. The Court cannot determine from the summary judgment record whether

Defendants are entitled to judgment as a matter of law on the state law claims.

Based upon the foregoing, Defendant Susan Savage's motion for Summary Judgment (Docket Entry #105) is **GRANTED;** Defendant, Ron Palmer's Motion for Summary Judgment (Docket Entry #106) is **GRANTED;** Defendant, City of Tulsa's Motion for Summary Judgment (Docket Entry #109) is **GRANTED;** and Defendants, Bill Yelton, Michael Eckert, Charles Jordan, Steven Middleton, B. Bonham, Chris Witt, Sgt. Jim Clark, Major W.B. York, Corporal A. Wilson, and Kevin Johnson's Motion for Summary Judgment (Docket #107) is **GRANTED** in part and **DENIED** in part. Plaintiff's Motion to Strike Defendants' Reply Briefs (Docket Entry #138)is **DENIED** and Plaintiff's Opposed Application for Surreply (Docket Entry #137) is **GRANTED.**

ENTERED this 28th day of October, 1999.

S//_____
MICHAEL BURRAGE
UNITED STATES DISTRICT
JUDGE

No. 00-1635

(3)

Supreme Court, U.S.
FILED
MAY 24 2001
OFFICE OF THE CLERK

In The
Supreme Court of the United States

W. B. YORK, *Petitioner*,

v.

DERONN WRATHER, STEPHEN WILLIAMS, and **VINCENT TURNER**, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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27 pp

RESPONSE TO QUESTIONS PRESENTED

1. Under the rule of *Johnson v. Jones*, 515 U.S. 304 (1995), should this Court consider an interlocutory appeal of a question of the facts of an individual Defendant's supervisory participation in the deprivation of Respondents' Free Speech and Assembly rights, cast by Petitioner as a question of law?

2. Does silence on the record as to probable cause to disperse a crowd entitle a supervisory police officer to qualified immunity for allegedly exercising a "discretionary duty" when he ordered dispersal of a crowd which the district court found to be peaceably assembled, a determination not questioned by the Tenth Circuit, and his supervisory participation directly caused the violation of clearly established Free Speech and Peaceable Assembly rights?

3. Did either the district court or the Tenth Circuit retain the Petitioner in this 42 U.S.C. §1983 action based upon a theory of *respondeat superior* for his supervisory participation in an unconstitutional action affecting clearly established Free Speech and Assembly rights?

LIST OF PARTIES

The Petitioner did not include in the Petition a list of parties to the proceeding in the court whose judgment is sought to be reviewed (Supreme Court Rule 24(1)(b)).

Respondents include the following names of all parties to the proceeding in the court whose ruling is sought to be reviewed which do not appear in the caption of the case:

Bruce Bonham	)	
William Yelton	)	Appellants in the
Michael Eckert	)	Circuit Court
Steven Middleton	)	
City of Tulsa	)	
Susan Savage	)	
Ron Palmer	)	
Charles Jordan	)	Defendants in the
Chris Witt	)	District Court
Jim Clark	)	
W. B. Major	)	
A. Wilson	)	
Kevin Johnson	)	

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

W. B. YORK is the Petitioner and Defendant. DERONN WRATHER, STEPHEN WILLIAMS, and VINCENT TURNER are Respondents and Plaintiffs.[1]

The Tenth Circuit properly dismissed Petitioner's qualified immunity appeal and remanded for trial on the merits. Respondents object to the Petition for Writ of Certiorari.[2]

[1]Deronn Wrather has married Vincent Turner, but to make identification consistent with the record below, she will be referred as WRATHER.

[2]References to the Petition for Writ of Certiorari will be: (Cert. Pet., p. (number)). References to the Appendix of Petitioner will be: (Pet. App. (page number)). References to the original record on appeal will be: (R/A, Vol. (number) p. (page number)).

OBJECTION TO PETITION

Respondents respectfully contend that under the rule of *Johnson v. Jones*, 515 U.S. 304 (1995), this Court should not consider this interlocutory appeal: Petitioner has attempted to cast a question of fact as a question of law regarding an individual Defendant's supervisory participation in an unconstitutional action affecting the Free Speech and Assembly rights of the Respondents.

The jurisdiction of this Court was invoked pursuant to 28 U.S.C. §1254(1), and York apparently seeks to bring it within the "collateral order" rule of *Mitchell v. Forsyth*, 472 U.S. 511, 524-530 (1985) *See also Cohen v. Beneficial Industrial Loan* Corp., 337 U.S. 541 (1949).

CONSTITUTIONAL, STATUTORY, AND RULES INVOLVED

Amendment I. Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (Ratified effective December 15, 1791)

Amendment XIV. Constitution of the United States

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Ratified July 9, 1868)

United States Code, Title 42:
§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.(R.S.

§ 1979; Pub. L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284, as amended Pub.L. 104-317, Title III, §309(c), Oct. 19, 1996, 110 Stat. 3853.)

COUNTERSTATEMENT OF THE CASE

For purposes of this proceeding, Respondents rely upon the following recited facts and on two video tape excerpts used during discovery and submitted on summary judgment: Eckert #1, a video of the events exposed by an amateur, and Witt #1, a video of some of the events exposed by a professional television news photographer, both with audio tracks.[3]

On May 4, 1996, the Ku Klux Klan met on the steps of the Tulsa County courthouse for a rally to be followed by a cross burning on private land. To protect the constitutional rights of free speech and assembly of the Klan members, law enforcement preparations were elaborate. Numerous armed officers, squad cars, horse-mounted officers, and a helicopter were present.

After the rally ended and the Klan members had been escorted to their vehicles by Sheriff's deputies and had left, numerous persons, including many African-Americans and

[3] Copies of these videos have been lodged with Mr. Frank Lorson of the Court Clerk's office.

the Plaintiffs, assembled south of the county office building near where the Klan vehicles had departed.[4]

Tulsa police decided to remove the assembled crowd for several purposes. The officers claimed, *inter alia*, that they wanted to disperse the crowd in favor of Klan sympathizers going to their cars (Pet. App. 12a)(". . . Defendants have presented evidence that the officers wanted to disperse the crowd in order to allow Ku Klux Klan sympathizers to have access to their cars.")[5] and because the crowd was

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[4] The Tenth Circuit indicated that the crowd had gathered approximately a block from the courthouse. (Pet. App. 2a) The video tape shows that the crowd was across the street from and directly south of the back of the courthouse.

Respondents disagree with Petitioner's statement that York was located ". . .at least a block away" from the scene. (Pet. Cert. 3). Officer Jordan testified that they were originally behind the YMCA at 6th and Denver and that York was at 6th and Cheyenne, approximately 50 yards north of 6th and Denver where the incident took place. (R/A, Vol. 1, p. 52)

The back of the courthouse appears in the Witt #1 video across the street from the crowd. The YMCA can be clearly seen in Witt #1 between 3:29 to 3:32 minutes into the video as the backdrop for the advancing horses. The letters "MCA" are visible. Thus, York was not necessarily as far away as his statement suggests, and his proximity would have affected his ability to view the scene prior to the horse operation.

[5]Petitioner's contention that "The group appeared to be waiting for the KKK to leave the courthouse area" (Cert. Pet. p. 2) may be ambiguous. The record does not show as an undisputed fact that the "waiting" group included the Plaintiffs and others whose assembling was

(continued...)

disrupting traffic flow (Pet. App. 13a). On the contrary, the Affidavit of Vincent Turner (Pet. App. 3a) and Witt #1 video show a peacefully assembled group.[6]

However, officers Jordan and Eckert consulted with Petitioner York, the overall commander of the operation, and decided to move the crowd out. Officers claimed they first told the crowd to disperse and that "when the crowd was instructed to move out of the street, many persons became

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[5](...continued)
later broken up by the police. (R/A, Vol. I, p. 1-5)

Nor is the statement supported by Petitioner's citation to the Tenth Circuit's decision in the Appendix. (Pet. App. 2a)

Nor does the record support any suggestion that the officers were acting to protect the Klan members who conducted the rally. The skirmish between the crowd and officers occurred almost 20 minutes after the Klan rally participants left the premises. Clark's report includes a "Log of Significant Events" which has a time entry at 1542, "Lt. Jones stated that all Klan veh. Out of parking lot." A later entry claims there were Klan stragglers at 6th and Elwood. (R/A, Vol. I, p. 4)

[6] The Tenth Circuit made specific reference to video evidence submitted on summary judgment, apparently referring to Eckert #1:

> Video evidence was also submitted, showing that before the horses arrived approximately ten Tulsa police officers were on the street facing a crowd of men, women, and children, predominantly African-American, who were milling around on the sidewalk and grassy area, and were sitting on a concrete fence enclosing a parking lot. No angry threats or interchanges can be heard on the video tape, and the crowd's demeanor appeared peaceful.
>
> Pet. App. 3a

agitated." (Pet. Cert., p. 3) At the time the horses were injected, Witt #1 video shows none of the group out in the street and shows the crowd's demeanor to be peaceful.[7]

The crowd was scattered through use of mounted horses, officers in a skirmish line, and pepper spray. (Pet. App. 2a) Plaintiff Turner was arrested for disorderly conduct. Plaintiff Wrather was arrested for obstructing officers, resisting arrest, and assaulting an officer. Plaintiff Williams was arrested for inciting a riot, assaulting an officer, and

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[7] By the testimony of the Mayor and the Chief of Police, the crowd appeared to be peaceful at the time the horses approached the crowd. At the very least, the dispute of these facts precludes summary judgment.

Mayor Susan Savage testified:

13 Q I apologize. Based upon your observations on
14 the tape, would you characterize the crowd, as you've
15 seen them on the tape, are they peaceful?
16 A Oh. Yes.
17 Q Peaceful?
18 A Yes.

R/A Vol.I, p. 35.

Chief Ronald Palmer testified:

Q. Sir, is it not true that at the time the officers arrived to established a skirmish line, and horses are interjected into the crowd, that the crowd is relatively peaceful?

140

A. The crowd appeared to be peaceful, but there was reports in my officers reports that there were problems in that crowd.

R/A, Vol.I, p. 120.

resisting arrest. (Pet. App. 2a) Plaintiffs contend they were peacefully assembled and arrested without probable cause.

REASONS FOR DENYING THE WRIT

I. PETITIONER YORK MISALLOCATES TO RESPONDENTS THE BURDEN OF SHOWING WHAT HE WAS TOLD BY JORDAN AND CLARK AS A PART OF HIS CLAIM FOR QUALIFIED IMMUNITY. AFTER PLAINTIFFS SHOW A CONSTITUTIONAL VIOLATION AND CLEARLY ESTABLISHED LAW, IT WAS YORK'S BURDEN TO SHOW THE NECESSITY OF AND AUTHORITY TO REMOVE THE PLAINTIFFS AND OTHERS FROM THE SIDEWALK SUCH THAT HE WOULD BE ENTITLED TO QUALIFIED IMMUNITY.

This Court has carefully crafted an immunity for public officials exercising discretionary functions which relies upon objective criteria:

> A court evaluating a claim of qualified immunity "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Conn v. Gabbert*, 526 U.S. 286 (1999). . . Deciding the

> constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public. See *County of Sacramento v. Lewis*, 523 U.S. 833, 840-842, n. 5 (1998).
>
> *Wilson v. Layne*, 526 U.S. 603, 609 (1999)

Accordingly, in its order, the Tenth Circuit properly held that:

> If a plaintiff makes the two-fold showing, the public official then bears the usual summary judgment movant's burden of showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. *Hinton [v. City of Elwood]*, 997 F.2d [774], [at] 779 [(10th Cir., 1993)]. Specifically, the defendant must show that " 'no material issues of fact remain as to whether the defendant's actions were objectively reasonable in light of the law and information the defendant possessed at the time of his action.' " *[Hill v.] Hollingsworth*, 110 F.3d [733] at 737 [(10th Cir., 1995)]
>
> Pet. App. p. 9a

York, however, contends that this latter burden remains with Respondents even after their requisite two-fold showing

rather than becoming his burden as would be normally expected in summary judgment determinations.

Plaintiffs showed that York was directly involved in the decision to remove them and other peaceably assembled persons from the sidewalks outside the Tulsa County office building so that Klan sympathizers could have the exclusive use of that sidewalk to travel to their cars. The right to peaceably assemble is clearly established. To be entitled to summary judgment on grounds of qualified immunity, it is York's burden to show undisputed facts that justified his decision; it is not Plaintiffs' burden to exclude all possibilities of York's nonliability. York's claim for immunity based upon an "absence of proof" which it was his responsibility to produce is the same as saying he had no reason for the decision.

Indeed, it is reasonable to require York to satisfy the ordinary burden of a party seeking summary judgment in its favor to produce sufficient evidence that excuses his liability once he is implicated in a constitutional violation.

A. A CONSTITUTIONAL VIOLATION OF PEACEABLE ASSEMBLY OCCURRED

For purposes of qualified immunity, the primary fact found by the district court and not challenged by the Tenth Circuit was that the crowd was peaceful.

Testimony, affidavits, and a video show that Plaintiffs' peaceful assembly was disrupted by Tulsa police officers obeying the commands of Defendant York. By his own admission, York participated in the order to disperse the

crowd, thereby demonstrating the personal involvement necessary to impose both direct and supervisory liability. From Defendant Jordan's perspective, York's action and participation were more than transitory: York was responsible for the horse procedure.

Q. Did anyone ever call you to answer to your decision to interject horses in this group that day, sir?
A. No, because Major York was there.
Q. Did anybody even ask you to write up a report about why you made this decision?
A. Major York made a report about it.

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Q. But you're the man who made the decision, according to your testimony, sir.
A. No, that's not correct.
Q. You and Officer Clark.
A. Yes, that is correct.
Q. Okay. So, did Officer Clark write a report on why he made this decision; to your knowledge?
A. You'd have to ask Sergeant Clark.
Q. Why didn't you write a report, sir?
A. Because everything -- **before that decision was carried out, it was ran by Major York and he took responsibility for that decision.**
Q. Where was Major York?
A. At that point in time, he was at 6th and Cheyenne approximately fifty yards north of 6th Street.

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> Q. Isn't it proper police procedure that you write a report when you make policy decisions like this, sir?
> A. I didn't make the decision. I gave him -- **It was made ultimately by Major York.**
>
> R/A, Vol. I pp.51-4 (Testimony of Charles Jordan)(emphasis added)

Plaintiff has satisfied his burden to show with particularity facts and law establishing the inference that Defendant York participated in a violation of a constitutional right through his decision to remove Plaintiffs who were part of a peaceful group. The Circuit's decision affirming denial of qualified immunity should not be disturbed.

B. RIGHT TO PEACEABLY ASSEMBLE CLEARLY ESTABLISHED

The law of the right to peaceably assemble is clearly established. Contention that the decision to disperse was based upon threats of violence is insufficient to justify curtailment of *First Amendment* rights. *See Shuttleworth v. City of Birmingham*, 394 U.S. 147, 152 (1969)("Peaceful citizens cannot be arbitrarily forced from a public sidewalk at the whim of a public official because of their race."); *Cox v. Louisiana*, 379 U.S. 536 (1965)(Local officials "unfettered discretion" in the regulation and use of the public streets was an unconstitutional infringement of the Petitioner's freedom of speech and assembly secured by the *First Amendment*);

Wright v. Georgia, 373 U.S. 284, 286 (1963); *See also Whitney v. California*, 274 U.S. 357, 378 (1927)("The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech and assembly.")(Brandeis, concurring); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Gregory v. City of Chicago*, 394 U.S. 111 (1969).

York took no action to protect the rights of the Plaintiffs to gather in locations of their choice, but instead decided to remove the Plaintiffs to give preference to a group of Klan sympathizers:

> . . . the freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the *Fourteenth Amendment*. We have expressly identified this "right to remove from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution. *Williams v. Fears*, 179 U.S. 270, 274 (1900); see also *Papachristou v. Jacksonville*, 405 U.S. 156, 164 (1972). Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage" *Kent v. Dulles*, 357 U.S. 116, 126, (1958), or the right to move "to whatsoever place one's own inclination may direct" identified in *Blackstone's*

Commentaries. 1 W. Blackstone, Commentaries on the Laws of England 130 (1765).

City of Chicago v. Morales, 527 U.S. 41, 53-54 (1999)

Police had no lawful authority to scatter a peaceably assembled crowd in order to protect Klan sympathizers from hearing its shouts and comments or to prefer their use of the sidewalk over the assembled group. *See Schenck v. Pro-Choice Network Of Western New York*, 519 U.S. 357 (1997)(Fixed buffer corridors can be established to permit expression by anti-abortion counselors)

Even verbal criticism directed at the police officers themselves would have been insufficient justification to disperse the crowd:

> . . . the *First Amendment* protects a significant amount of verbal criticism and challenge directed at police officers. "Speech is often provocative and challenging. . . . [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."

City of Houston, Tex. v. Hill, 482 U.S. 451, 461-62 (1987)

C. PETITIONER HAS NOT SATISFIED HIS BURDEN

Because Plaintiffs made the required two-fold showing that a constitutional right was violated and the law was clearly established, the public official then bears the usual summary judgment movant's burden of showing there are no genuine issues of material fact and that the official is entitled to judgment as a matter of law and that the official's actions were objectively reasonable in light of the law and information the official possessed at the time of the actions. York has the burden of showing the conversation between him and Defendant Jordan which justified the decision to remove the Plaintiffs.

Simply put, Defendant York has not proffered any evidence that his actions were objectively reasonable. He has offered no facts which justify the decision to remove Plaintiffs lawfully and peaceably assembled on the sidewalk. The burden to explain what information was given to him that objectively justifies the decision is his, not Plaintiffs'.

If there be some claim of "probable cause" sufficient to justify York's command to move out the Plaintiffs, he has not recited any. An officer has a ". . .nondelegable duty of determining probable cause." *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1258 (10th Cir., 1998) York had a nondelegable duty to determine a proper reason to give the command to disperse the peaceful crowd. He may rely upon what other officers have told him, but he has not testified as to what that was. Even if York claims that the crowd was violent, that is disputed by the video tape and the Affidavit of Vincent Turner: therefore, facts are in contention, and he

is not entitled to summary judgment. York's claim that this is the burden of Plaintiff is simply sleight of hand over the allocation of burden shifting for summary judgment determinations in qualified immunity cases.

II. YORK'S LIABILITY IN THIS MATTER ARISES FROM HIS SUPERVISORY ACTIONS AND NOT *RESPONDEAT SUPERIOR*. HE KNEW OR SHOULD HAVE KNOWN THAT HIS DIRECTION TO HIS SUBORDINATES WOULD HAVE VIOLATED PLAINTIFFS' FIRST AMENDMENT RIGHTS.

York raises a claim that the Tenth Circuit's decision will allow the imposition of liability based upon *respondeat superior*. However, such an issue is not discussed in the Circuit's decision nor does it reasonably appear that the Circuit's burden-shifting requirement properly allocated to York imposes *vicarious* liability on him for the actions of his subordinates.[8] Instead, the Circuit properly imposed on York the burden of showing his actions were reasonable in light of the facts in contention.

York commanded, directed, ratified, and acquiesced in the actions of Clark and Jordan and the other officers. *See Woodward v. City of Worland*, 977 F.2d 1392, 1400 (10th Cir., 1992)(". . proper articulation of the test for supervisory liability under **§1983** . . requires 'allegations of personal

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[8]A discussion of *respondeat superior* does occur in the district court's decision, but not in reference to Defendant York. (Pet. App. 25a-26a)

direction or of actual knowledge and acquiescence.' ")[9] citing *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3rd Cir., 1990); *See also Kite v. Kelley*, 546 F.2d 334, 337 (10th Cir., 1976)(holding in a Bivens action that "before a supervisor may be held for acts of an inferior, the superior . . . must have participated or acquiesced in the constitutional deprivations") As otherwise stated by the Tenth Circuit:

> For liability under **§1983**, direct participation is not necessary. Any official who "causes" a citizen to be deprived of her constitutional rights can also be held liable. The requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights.
>
> *Snell v. Tunnell*, 920 F.2d 673, 700 (10th Cir., 1990)

No reasonable officer alert to the right of the Plaintiffs to exercise constitutional rights of assembly or loitering would have ordered the removal of Plaintiffs from the sidewalk in preference to Klan sympathizers.

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[9]Thus, at the very least, York's acquiescence in the decision to disperse the crowd satisfies the ". . . deliberate, intentional act by the supervisor to violate constitutional rights" test noted in *Woodward v. City of Worland*, 977 F.2d 1392, 1399 (10th Cir., 1992).

CONCLUSION

Petitioner York attempts to misallocate the normal burdens required in summary judgment and to shift to the Respondent Plaintiffs an element of proof which is his. York clearly ordered the removal of Plaintiffs from the public sidewalk. Such an action viewed in light of facts most favorable to Plaintiffs would amount to a constitutional violation.

Further, the law of peaceable assembly has been clearly established for a long time. The Plaintiffs made their two-fold burden showing, so the burden of producing evidence shifts to York to show his actions were objectively reasonable. He has not done so.

York's liability is not based upon *respondeat superior*, but on supervisory liability. His order set in motion the unconstitutional deprivation of peaceable assembly suffered by the Plaintiffs, and contentions that the condition of the crowd was such that required dispersal are disputed. The Petition should be dismissed.

Faithful to constitutional principles, the Tulsa police, of which Petitioner is a supervisor, scrupulously protected the free expression and assembly rights of bigots and racists to assemble a Klan rally on the front door step of the Tulsa County courthouse. The Tulsa police's sensitivity to the free speech rights of Klan sympathizers resulted in a plan, participated in by all the Defendants, including Defendant York, to drive officers mounted on horses into the assembly

and to use pepper spray on resisters which resulted in the arrest of these African-Americans. The protections afforded members of the Invisible Empire were not the same as those afforded to these Plaintiffs.

Respectfully submitted,

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